Public Bank Bhd v Nik Chee Kok @ Nik Soo Kok

HIGH COURT (KUALA LUMPUR) — SUIT NO S3–22–283 OF 1996
RAMLY ALI J
2 APRIL 2003

Civil Procedure *— Action — Limitation period — Loan agreement — Demand for repayment from guarantors — Whether action time-barred — When time begins to run — Court of Appeal had decided issue in relation to the first defendant — Applicability of Court of Appeal decision to the present case — Limitation Act 1953 s 6(1)(a)*

Contract *— Consideration — Past consideration — Loan agreement — Loan was disbursed before the execution of guarantee — Whether the guarantee was valid even though it relates to past consideration*

The plaintiff granted to the borrower a fixed loan facility for the purpose of enabling the borrower to complete its housing project. By a letter of guarantee and in consideration of the plaintiff granting the fixed loan facility to the borrower, the first, second and third defendants 'jointly and severally agreed to pay on demand to the plaintiff all money including interest which is or may during the operation of the guarantee be owing to the plaintiff from the borrower or remain unpaid ...'. Before the guarantee was executed, the plaintiff has disbursed RM4m of the said loan to Oriental Bank in order to satisfy the borrower's loan earlier taken from Oriental Bank and to discharge the charge on the said land. The borrower failed to repay the loan. The plaintiff through its solicitors issued a letter of demand dated 2 April 1996 ('the first demand') to the borrower and all the three defendants. Subsequently, the plaintiff issued another letter of demand dated 15 May 1986 ('the second demand'). The plaintiff then filed an action against all the three defendants. Subsequently on 20 July 1993, the plaintiff sent another letter of demand ('the third demand') to all the three defendants. On 12 June 1996, the plaintiff re-filed the action against all the three defendants. On 2 June 1997, the plaintiff discontinued the action against the second defendant. Both the first and third defendant had applied for the plaintiff's action against them be struck out under O 18 r 19 of the Rules of the High Court 1980 on the ground that the plaintiff's claim was statute barred by virtue of s 6(1)(a) of the Limitation Act 1953. The learned senior assistant registrar ('SAR') granted the application. The plaintiff then appealed to the judge in chambers against the said decision of the SAR. The judge in chambers allowed the appeal. The first defendant then further appealed against the said decision of the judge in chambers to the Court of Appeal. However, the third defendant did not file any appeal against the said decision of the judge in chambers. The Court of Appeal allowed the first defendant's appeal, leaving the plaintiff's claim against the third defendant to be determined by this court. The issues to be determined by the High Court were namely: (i) whether the plaintiff's claim against the third defendant was time

barred; and (ii) whether the guarantee was valid for past consideration. A

Held:

(1) The decision of the Court of Appeal on this same issue was very clear. Even though the decision only relates to the first defendant, there was no reason why the High Court should not adopt the said decision as it was made based on the same set of facts, the same set of transaction and the same letters of demand as in the present consideration before this court involving the third defendant. In the present case, following the said decision of the Court of Appeal, the liability of the third defendant under the guarantee arose from the first demand dated 2 April 1986. That was the time when the plaintiff's cause of action against the third defendant accrued. The plaintiff filed an action against the third defendant on 12 June 1996, ie clearly beyond six years from the date of the first demand (2 April 1986). On the above premise, the court has no hesitation to rule that the plaintiff's claim against the third defendant was time barred (see pp 463A–B, 464B–D). B C D

(2) The third defendant knew about the whole transaction right from beginning when the borrower applied for the loan from the plaintiff, the purpose of the loan as well as the payment of RM4m made by the plaintiff to Oriental Bank to secure a discharge of the charge on the said land. The letters also indicated that the payment of RM4m made by the plaintiff to Oriental Bank to secure a discharge of the charge on the said land was made at the request of the borrower through the third defendant who was a director at that material time. Past consideration is good consideration if it comes at the request of the promissor. The guarantee was valid even though it relates to past consideration (see pp 465C–D, I, 466C); *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355 and *Lampleigh v Braithwait* (1615) Hobart 105 followed. E F G

[Bahasa Malaysia summary

Plaintif telah memberikan peminjam satu kemudahan pinjaman tetap bagi tujuan membolehkan peminjam menyelesaikan projek perumahannya. Melalui satu surat jaminan dan sebagai balasan kepada plaintif yang telah memberikan kemudahan pinjaman tetap tersebut kepada peminjam, defendan-defendan pertama, kedua dan ketiga telah 'jointly and severally agreed to pay on demand to the plaintiff all money including interest which is or may during the operation of the guarantee be owing to the plaintiff from the borrower or remain unpaid ...'. Sebelum jaminan tersebut disempurnakan, plaintif telah membayar RM4j daripada pinjaman tersebut kepada H I

Oriental Bank bagi tujuan memenuhi pinjaman peminjam yang terdahulu diambil daripada Oriental Bank dan untuk membatalkan gadaian ke atas tanah tersebut. Peminjam telah gagal untuk membayar balik pinjaman tersebut. Plaintif melalui peguamcaranya telah mengeluarkan surat tuntutan bertarikh 2 April 1996 ('tuntutan pertama') kepada peminjam dan ketiga-tiga defendan-defendan tersebut. Berikutan itu, plaintif telah mengeluarkan satu lagi surat tuntutan bertarikh 15 Mei 1986 ('tuntutan kedua'). Plaintif kemudian telah memfailkan satu tindakan terhadap ketiga-tiga defendan-defendan tersebut. Selepas itu pada 20 Julai 1993, plaintif telah menghantar satu lagi surat tuntutan ('tuntutan ketiga') kepada ketiga-tiga defendan-defendan tersebut. Pada 12 Jun 1996, plaintif telah memfailkan semula tindakan tersebut terhadap ketiga-tiga defendan-defendan tersebut. Pada 2 Jun 1997, plaintif telah membatalkan tindakan tersebut terhadap defendan kedua. Kedua-dua defendan pertama dan ketiga telah memohon agar tindakan plaintif terhadap mereka dibatalkan di bawah A 18 19 Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan bahawa tuntutan plaintif telah luput had masa menurut s 6(1)(a) Akta Had Masa 1953. Penolong kanan pendaftar yang bijaksana ('PKP') telah membenarkan permohonan tersebut. Plaintif kemudian telah membuat rayuan kepada hakim dalam kamar terhadap keputusan PKP tersebut. Hakim dalam kamar telah membenarkan rayuan tersebut. Defendan pertama kemudian telah seterusnya merayu terhadap keputusan hakim dalam kamar tersebut kepada Mahkamah Rayuan. Bagaimanapun, defendan ketiga tidak memfailkan apa-apa rayuan terhadap keputusan hakim dalam kamar tersebut. Mahkamah Rayuan telah membenarkan rayuan defendan pertama, dan membiarkan tuntutan plaintif terhadap defendan ketiga ditentukan oleh Mahkamah Tinggi. Persoalan-persoalan yang perlu ditentukan oleh mahkamah adalah: (i) sama ada tuntutan plaintif terhadap defendan ketiga telah luput had masa; dan (ii) sama ada jaminan tersebut sah untuk balasan lampau.

Diputuskan:

(1) Keputusan Mahkamah Rayuan atas persoalan yang sama adalah amat jelas. Walaupun keputusan tersebut hanya berkaitan defendan pertama, tiada sebab kenapa Mahkamah Tinggi tidak patut menerimapakai keputusan tersebut kerana ia dibuat berdasarkan satu set fakta-fakta yang sama, transaksi yang sama dan surat-surat tuntutan yang sama seperti dalam pertimbangan semasa di hadapan mahkamah ini yang melibatkan defendan ketiga. Dalam kes semasa, mengikut keputusan Mahkamah Rayuan tersebut, liabiliti defendan ketiga di bawah jaminan tersebut bermula daripada tuntutan pertama bertarikh 2 April 1986. Itu adalah masa apabila kausa tindakan plaintif terhadap defendan ketiga bermula. Plaintif telah memfailkan satu tindakan terhadap defendan ketiga pada 12 Jun 1996, iaitu

lebih daripada enam tahun daripada tarikh tuntutan pertama (2 April 1986). Berdasarkan premis tersebut di atas, mahkamah tidak teragak-agak untuk memutuskan bahawa tuntutan plaintif terhadap defendan ketiga telah luput had masa (lihat ms 463A–B, 464B–D).

(2) Defendan ketiga mengetahui keseluruhan transaksi tersebut dari mula apabila peminjam memohon untuk pinjaman daripada plaintif, tujuan pinjaman tersebut dan juga pembayaran RM4j yang dibuat oleh plaintif kepada Oriental Bank untuk membatalkan gadaian ke atas tanah tersebut. Surat-surat tersebut juga menunjukkan bahawa pembayaran RM4j oleh plaintif kepada Oriental Bank untuk membatalkan gadaian ke atas tanah tersebut telah dibuat atas permintaan peminjam melalui defendan ketiga yang merupakan seorang pengarah pada masa matan. Balasan lampau adalah balasan yang baik jika ia wujud daripada permintaan penjanji. Jaminan tersebut adalah sah walaupun ia berkaitan balasan lampau (lihat ms 465C–D, I, 466C); *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355 dan *Lampleigh v Braithwait* (1615) Hobart 105 diikut.]

Notes

For cases on limitation period, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2324–2328.

For cases on past consideration, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 138–141.

Cases referred to

Lampleigh v Braithwait (1615) Hobart 105 (refd)

Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610 (refd)

Nik Che Kok @ Nik Soo Kok v Public Bank Bhd [2001] 2 MLJ 328 (refd)

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank [1989] 3 MLJ 155 (refd)

Pao On v Lau Yiu Long [1980] AC 614 (refd)

South East Asia Insurance Bhd v Nasir Ibrahim [1992] 2 MLJ 355 (refd)

Legislation referred to

Contracts Act 1950 s 2(d)

Limitation Act 1953 s 6(1)(a)

Rules of the High Court 1980 O 18 r 19

Barry Goh Meng Yew (*Iza Ng Yeoh & Kit*) for the plaintiff.

Tabian bin Tahir (*Tabian Tahir & Co*) for the third defendant.

Ramly Ali J:

THE PLAINTIFF'S CLAIM

At the request of Nik Seng Development Sdn Bhd ('the borrower'), the plaintiff on 5 October 1982 granted to the borrower a fixed loan facility for RM5,500,000 for the purpose of enabling the borrower to complete its housing project. By a letter of guarantee dated 29 December 1982 and in consideration of the plaintiff granting the above fixed loan facility to the borrower, the first, second and third defendants 'jointly and severally agreed to pay on demand to the plaintiff all money including interest which is or may during the operation of the guarantee be owing to the plaintiff from the borrower or remain unpaid on the general balance of the borrower's account to the extent of RM6,000,000.' The said guarantee was a 'continuing guarantee.' As additional security for the said loan, the borrower has also charged its land held under Lots 4470, 4471, 5614 and 5615, Behrang Station Estate, Mukim Ulu Bernam, Daerah Batang Padang, Perak.

On 3 December1982 (ie before the said guarantee was executed), the plaintiff has disbursed RM4m of the said loan to Oriental Bank in order to satisfy the borrower's loan earlier taken from Oriental Bank and to discharge the charge on the said land.

The borrower failed to repay the loan. The plaintiff through its solicitors issued a letter of demand dated 2 April 1996 ('the first demand') to the borrower and all the three guarantors. Subsequently, the plaintiff issued another letter of demand dated 15 May 1986 ('the second demand') to the borrower and all the three defendants. The plaintiff then filed an action in Kuala Lumpur High Court vide Civil Suit No C1–23–3411 of 1986 against all the three guarantors based on the guarantee. On 28 January 1992, the plaintiff withdrew the action with liberty to file afresh and it was granted by the court. Subsequently on 20 July 1993, the plaintiff sent another letter of demand ('the third demand') to all the three guarantors demanding for the payment of RM5m (as at 19 July 1993) based on the same guarantee. On 12 June 1996, the plaintiff refiled the action against all the three guarantors (as defendants) based on the said guarantee.

On 2 June 1997, the plaintiff discontinued the action against the second defendant. Both the first and third defendant had applied for the plaintiff's action against them be struck out under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') on the ground that the plaintiff's claim was statute barred by virtue of s 6(1)(a) of the Limitation Act 1953. The learned senior assistant registrar ('SAR') granted the application. The plaintiff then appealed to the judge in chambers against the said decision of the SAR. The judge in chambers allowed the appeal by the plaintiff and accordingly reversed the SAR decision on the ground that there are triable issues and the case is not one fit to be struck out under O 18 r 19 of the RHC. The first defendant then further appealed against the said decision of the judge in chambers to the Court of Appeal. However, the third defendant did not file

any appeal against the said decision of the judge in chambers. On 8 March 2001, the Court of Appeal allowed the first defendant's appeal on the ground that the plaintiff's claim was time barred, and accordingly the plaintiff's claim against the first defendant was struck out, leaving the plaintiff's claim against the third defendant to be determined by this court. The plaintiff then applied for leave to appeal to the Federal Court against the decision of the Court of Appeal, but the application was dismissed by the Federal Court.

THE DEFENCE

The third defendant argued that the said guarantee was null and void for past consideration since the plaintiff had released the said loan to the borrower before the said guarantee was signed. The third defendant also argued that the plaintiff's claim against him is statute barred pursuant to s 6(1)(a) of the Limitation Act 1953.

ISSUES TO BE DETERMINED

Both parties have agreed to the following issues to be determined by the court, namely:

i) whether the plaintiff's claim against the third defendant is time barred; and

ii) whether the guarantee was valid for past consideration.

Whether the plaintiff's claim is time barred

Paragraph 1 of the guarantee clearly provides that the guarantors 'will pay you (the plaintiff) on demand all money ...'. A guarantee of this nature is known as an 'on demand guarantee'. It is trite law that the liability of the guarantor on this type of guarantee is based on the demand made by the plaintiff. The guarantor is only liable under the guarantee if a demand has been made. In other words, the plaintiff's cause of action against the third defendant (as a guarantor) only arises upon demand made against the third defendant after the borrower has defaulted in its payment. The Supreme Court in *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610, at p 611 had made the following rulings:

> The reason is that in the letters of guarantee the provisions about demand are a real stipulation and not mere words. Under clause 1, the guarantors are to pay 'on demand ...'. Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing guarantor ....

(see also *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank* [1989] 3 MLJ 155 (SC).)

The plaintiff issued a total of three demands to the borrower and all the three guarantors respectively. The first demand was made on 2 April 1986,

followed by the second demand on 15 May 1986. The third demand was made on 20 July 1993, after the first action against all the guarantors vide Kuala Lumpur High Court Guaman Sivil No C1–23–3411 of 1986 was withdrawn with liberty to file afresh.

The third defendant is contending that for the purpose of limitation period, time started to run from the failure of the third defendant to comply with the first demand made on 2 April 1986. As the present action was only filed on 12 June 1996, the third defendant argued that the period has exceeded six years and therefore the plaintiffs claim is time barred. The plaintiff, on the other hand argued that the first and second demands, respectively made on 2 April 1986 and 15 May 1986 were not in order and therefore invalid. The plaintiff also argued that the liability of the third defendant did not arise as a result of the first demand made on 2 April 1986 because that demand merely calls for payment on overdue interest and not a demand for repayment of the loan. Thus, the plaintiff further contended that time should only run after the third demand made on 20 July 1993 which the plaintiff considered as a valid demand.

The first demand on 2 April 1986 is reproduced in full below:

AR REGISTERED 6884–GEN/86(49)
2 April 1986

Nikseng Development Sdn Bhd (BORROWER)
No 501 5th Floor
Wisma Central
Jalan Ampang
Kuala Lumpur

Nikseng Plantation Sdn Bhd(BORROWER)
No 501 5th Floor
Wisma Central
Jalan Ampang
Kuala Lumpur

Encik Raja Abdullah Wahaman(GUARANTOR)
bin Raja Sulaiman
5 Jalan 5/15G
Petaling Jaya

Mr Nik Che Kok(GUARANTOR)
49 Ja/an Jejawi
Bukit Bandar Raya
Kuala Lumpur

Mr Goh Poh Seng(GUARANTOR)
26 Ja/an Sentosa
Section 3/57A
Petaling Jaya

Dear Sirs,

Re FL 71492–6 & FL 71555–8 & 02–05445–3

We act for Public Bank Berhad of No 6, Jalan Sultan Sulaiman, Kuala Lumpur.

Our clients inform us that the following accounts maintained by you are outstanding :

Account No	Facility	Amount Outstanding
FL 71492–6	Fixed loan	$1,421,926.60 being overdue fixed loan interest as at 28 February 1986
FL 71555–8	Fixed loan	$340,657.75 being overdue fixed loan interest as at 28 February 1986
02–05445–3	Overdraft	$189,856.78 being excess overdraft against an operative limit of $500,000 as at 28 February 1986.

Despite our clients' repeated reminders to you to settle the above outstanding sums, you have to date still failed, refused and/or neglected to do so.

TAKE NOTICE that unless you settle the above outstanding sums together with our notice fee of $900 within this next 14 days from the date hereof our client will recall the entire facilities granted to you and we shall forthwith commence legal action without further notice.

Yours faithfully,
Sgd
cc PBB-Cr Con/KLL/zz/nmaI71492, 71555, 5445
cc Cr Con Dept, Head Office.

The same issue has already been dealt with by the Court of Appeal in *Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328 where the first defendant had appealed against the decision of the judge in chambers. The Court of Appeal has dealt with the same set of facts which arise from the same set of transaction involving the same letters of demand issued by the plaintiff to all the three guarantors. All the three letters of demand were duly considered by the Court of Appeal which accordingly has made the following conclusions (at p 331):

> Looking at the facts and circumstances of this case, we are of the view that the liability of the principle debtor as well as that of the guarantors arose from the first notice of demand dated 2 April 1986. For all intents and purposes it is a notice of demand failing which the respondent could have legally filed a suit against the principal debtor as well as against the guarantors. Conceded that the first notice of demand did not specify the precise amount owing but there is no general rule that such a notice must specifically mention the precise amount owing. We are of the view that a demand is for the purpose of bringing home to the debtor that the creditor is demanding its money. (See *O'day v Commercial Bank of Australia* (1993) 50 CLR 200). It is our view that for the purpose of limitation, time began to run from the earliest time at which the creditor could have brought an action. In the present case the earliest that the plaintiff could have commenced a suit was soon after issuing the notice of demand of 2 April 1986. On the facts of this case, we are of the view that since the suit was filed more than six years after the cause of action arose, the suit is statute barred by virtue of s 6(1)(a) of the Limitation Act 1953. In the premises we allowed the appeal with costs and ordered that the deposit be refunded to the appellant.

A The decision of the Court of Appeal on this same issue is very clear. The plaintiff's application for leave to appeal the said decision to the Federal Court was dismissed by the Federal Court. Therefore, the said decision still in force. Even though the decision only relates to the first defendant, there is no reason why this court should not adopt the said decision as it was made based on the same set of facts, the same set of transaction and the same B letters of demand as in the present consideration before this court involving the third defendant. Both the first and the third defendants are guarantors to the borrower in the same loan transaction involving the same letter of guarantee. The fact that the third defendant did not appeal against the decision of the judge in chambers to the Court of Appeal does not mean that C the said decision of the Court of Appeal cannot be adopted for the purpose of the third defendant. In reversing the decision of the SAR, the judge in chambers did not at any time ruled specifically that the plaintiff's claim was not time barred. The decision of the judge in chambers is that there were triable issues and therefore, it was not a fit and proper case to strike out the plaintiff's claim. With that decision, the third defendant is still at a liberty D to raise the issue of limitation period before this court now.

The plaintiff's counsel submitted that the said decision of the Court of Appeal should not be followed because the letter of demand dated 2 April 1986 issued by the plaintiff was bad and invalid. This court cannot accept this submission as the same issue had already been considered and E determined by the Court of Appeal in the appeal involving the first defendant earlier.

In his attempt to persuade this court not to follow the said decision of the Court of Appeal, the plaintiff's counsel in his submission went to the extent of saying that the Court of Appeal has failed to consider the relevant F principles and authorities submitted by the plaintiff. The plaintiff counsel even submitted that the Court of Appeal has come to a wrong conclusion in its finding on the letter of demand. The relevant part of the plaintiff's counsel's submission is reproduced below:

> G Tambahan pula, Mahkamah Rayuan dalam rayuan defendan pertama itu tidak menimbangkan prinsip-prinsip dan autoriti-autoriti yang dikemukakan di perenggan 1.1. di atas ini langsung *dan telah membuat anggapan yang tidak betul di ms 3d–e dan 4b–c IAD3 bahawa surat bertarikh 15 Mei 1986 itu adalah surat tuntutan tanpa menimbangkan atau dirujuk kepada isu-isu yang telah kami membentangkan di atas ini walaupun prinsip-prinsip dan autoriti-autoriti tersebut adalah mengikatnya* kerana prinsip-prinsip itu berdasarkan keputusan H Mahkamah Agung dan Mahkamah Persekutuan. Ini jelas dilihat pada ms 4b–c, 'For all intents and purposes, it [iaitu surat bertarikh 2 April 1986 yang meminta untuk pembayaran faedah sahaja] is a notice of demand failing which the respondent could have legally filed suit against the principal debtor as well as against the guarantors dan jelas gagal mengambilkira kesan isu yang dibangkitkan dalam autoriti seperti *Dow Banking Corporation [v Mahnakh Spinning & Weaving Corp Sdn Bhd* (1983) 2 Lloyd's Rep 561] atau *Mok Hin* I *Wah v United Malayan Banking Corp Bhd* [[1987] 2 MLJ 610] (sila lihat di atas). Kegagalan dasar fakta keputusan itu menjadikannya suatu panduan yang tidak patut diikuti oleh Yang Arif Tuan Hakim. (Emphasis added.)

With respect, this court has to say that this line of submission is grossly improper and merits no consideration at all. The matter has been argued and dealt with by the Court of Appeal, where the plaintiff is a party. The Court of Appeal has made a decision. Their application for leave to appeal to the Federal Court has been dismissed. The said decision therefore stands. To put forward the above submissions before this Court (which is inferior to the Court of Appeal) is not provided by any rules of procedure. It is not for this court to entertain and decide whether the Court of Appeal was right or wrong in coming to the said decision.

In the present case, following the said decision of the Court of Appeal, the liability of the third defendant under the guarantee arose from the first demand dated 2 April 1986. That is the time when the plaintiff's cause of action against the third defendant accrued, ie the time when the plaintiff could have legally filed a claim against the third defendant. As has been said by the Court of Appeal, that 'a demand is for the purpose of bringing home to the debtor (guarantor) that the creditor is demanding its money'. The limitation period should run from 'the earliest time at which the creditor could have brought an action'. In the present case, the plaintiff filed an action against the third defendant on 12 June 1996, ie clearly beyond six years from the date of the first demand (2 April 1986).

On the above premise, this court has no hesitation to rule that the plaintiff's claim against the third defendant is time barred by virtue of s 6(1)(a) of the Limitation Act 1953 which provides that no action founded on a contract shall be brought after the expiration of six years from the date on which the cause of action accrued.

On this ground alone, this court rules that the plaintiff's claim against the third defendant by struck off with costs.

Issue of past consideration

The third defendant contended that the guarantee in question was not valid because of past consideration, ie the plaintiff had released RM4m of the loan (on 3 December 1982) before the said guarantee was signed by the third defendant (on 29 December 1982).

The third defendant was at the material times when he signed the guarantee, a director and shareholder of the borrower. The loan was granted to the borrower to enable the borrower to complete its housing project. In the offer letter dated 5 October 1982 (cl 3(b)) given by the plaintiff to the borrower, it was stated that the loan was 'to be additionally guaranteed by all the directors of the company jointly and severally ...'. The first RM4m was released by the plaintiff to Oriental Bank on request of the borrower for the purpose of discharging the land in question which was charged to Oriental Bank. It has to be done first before the said land can be charged again to secure the said loan granted by the plaintiff to the borrower. In the borrower's letter dated 23 June 1982 to the plaintiff, signed by the third defendant (as a director of the borrower), the borrower admitted, inter alia, that 'the land is presently charged to Oriental Bank Bhd

for overdraft facilities of Ringgit Six Million (RM6,000,000)'. The said letter also states that the borrower 'wish to apply to your Bank (the plaintiff) for overdraft facilities of Ringgit Six Million (RM6,000,000) as bridging and construction finance to replace the loan granted to us (the borrower) by Oriental Bank Bhd.' In another letter dated 27 October 1982, signed by the third defendant as a director of the borrower, addressed to Oriental Bank Bhd, it is stated that:

> We have obtained a loan from Public Bank Bhd for our development under reference. As such we would like to pay back to you for the amount outstanding. Payment will be made by Public Bank Bhd.

All these letters, signed by the third defendant as a director of the borrower, clearly show that the third defendant knew about the whole transaction right from beginning when the borrower applied for the loan from the plaintiff, the purpose of the loan as well as the payment of RM4m made by the plaintiff to Oriental Bank to secure a discharge of the charge on the said land. The letters also indicate that the payment of RM4m made by the plaintiff to Oriental Bank to secure a discharge of the charge on the said land was made at the request of the borrower through the third defendant who was a director at that material time. All these letters were dated before the loan was released to Oriental Bank and also before the third defendant signed the guarantee.

The legal principle relating to past consideration was established as early as 1615 in the case of *Lampleigh v Braithwait* (1615) Hobart 105, where it was held:

> First ... a mere voluntary courtesie will not have a consideration to uphold an assumpsit. But if that courtesie were moved by a suit or request of the party that gives the assumpsit, it will bind, for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference.

This principle was adopted by the Privy Council in the case of *Pao On v Lau Yiu Long* [1980] AC 614, where Lord Seaman held that 'an act done before the giving of a promise could be valid consideration for that promise if the act had been done at the promisor's request.'

In our Contracts Act 1950, s 2(d) provides:

> When, at the desire of the promisor, the promise or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

In *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355, the then Supreme Court has held that the use of the words 'has done or abstained from doing' as appear in s 2(d) of the Contracts Act 1950, shows that our Contracts Act 1950, recognizes the principle laid down in *Lampleigh v Braithwait*, ie that past consideration is good consideration if it comes at the request of the promissor. It was further held in that case (*South East Asia Insurance Bhd v Nasir Ibrahim*) that:

(2) The essence of consideration is that the promise has taken upon itself some kind of burden or detriment. The detriment undertaken by the promise, the appellant, which in this case is the giving of a guarantee to a third party at the request of the promissor, the respondent, is a past performance and should be sufficient consideration where there is a promise in consideration of some act previously done by the promise at the request of the promisor. In deciding whether consideration is past, the court should not take a strictly chronological view. If the consideration and the promise are substantially one transaction, as in this case, it should not matter in what order they are given. In order words, consideration itself accommodates past consideration so long as the 'desire' requirement is specified, that is the guarantee was given at the request of the indemnifier. As it can be proved that there was consideration, it can also be proved that the third party indemnity was valid.

Based on the above authorities, this court rules that, in the present case, the guarantee was valid even though it relates to past consideration.

CONCLUSION

Even though the answer to the second issue is in the affirmative, ie the said guarantee in question is valid even though it relates to past consideration, the court has already held that the plaintiff's claim against the third defendant is time barred by virtue of s 6(1)(a) of the Limitation Act 1953, In the premise, the plaintiff's claim against the third defendant is therefore struck off with costs.

Order accordingly.

Reported by Peter Ling